NO. 02-3393

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHERRY ANDERSON,
Plaintiff-Appellant,

v.

THE RAYMOND CORPORATION,
Defendant-Appellee

Appeal From The United States District Court
For the Eastern District of Arkansas,
Case No. 99-C-1483
The Honorable Stephen Reasoner

BRIEF OF DEFENDANT-APPELLEE THE RAYMOND CORPORATION

Francis H. LoCoco
Joshua B. Fleming
Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
414-277-5000

James M. Simpson, Jr.
Friday, Eldrege & Clark
400 West Capitol Avenue
Little Rock, Arkansas 72201

Attorneys for Defendant-Appellee, The Raymond Corporation

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellant Sherry Anderson ("Appellant) brought a product liability action against The Raymond Corporation ("Raymond") under Arkansas law arising out of an accident involving a Raymond Model 20 narrow aisle forklift truck. Appellant brought causes of action under theories of negligence, strict liability and failure to warn. Appellant contended that Raymond should have designed the Model 20 to incorporate certain other safety features, including alternative designs and warnings. In other words, she alleged a design defect.

Initially, Appellant offered Andrew LeCocq as her expert and standard bearer for her defect allegations. However, the District Court excluded Mr. LeCocq because he was not an expert in the field of forklift design and engineering and he did not satisfy the standards for admissibility under Rule 702 and *Daubert*.

Despite striking LeCocq, the district court gave Appellant a second chance to name an expert who might satisfy Rule 702 and *Daubert*. However, when Appellant failed to timely disclose her new expert, the district court excluded him as well and granted Raymond's motion for summary judgment because she had failed to support her claims with expert testimony.

Because the issues presented are not novel and this case is straightforward, Raymond does not seek oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellate Court No: 02-3393

Short Caption: Sherry Anderson v. The Raymond Corporation

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item # 3):

The Raymond Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Francis H. LoCoco & Joshua B. Fleming, Quarles & Brady LLP, Milwaukee, Wisconsin

James M. Simpson, Friday, Eldredge & Clark, Little Rock Arkansas

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

BT Raymond, Inc.

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:

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Apposite Cases:

Dancy v. Hyster, 127 F.3d 649, (8th Cir. 1997)
Peitzmeier v. Hennessy, 97 F.3d 293 (8th Cir. 1996)
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Apposite Cases:

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Apposite Cases:

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Broadway v. Norris, 193 F.3d 987, 989 (8th Cir. 1999)

STATEMENT OF THE CASE

The Appellant Sherry Anderson ("Appellant") filed her lawsuit in July 1999 as a result of injuries she suffered in August 1996. (A02) Appellee, The Raymond Corporation ("Raymond"), removed the case to the United States District Court for the Eastern District of Arkansas.

On December 31, 2001, after two and one half years of discovery and having deposed Appellant's expert, Raymond moved to exclude the testimony of Andrew LeCocq pursuant to Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). (A43) Raymond contended that Mr. LeCocq was not qualified to offer opinions as an expert in the design of forklift trucks, such as the Model 20 at issue in this case, and that Mr. LeCocq's opinion that the Model 20 was defective was unreliable, and thus inadmissible. (*Id*.)

The district court agreed with Raymond and granted its motion to strike Mr. LeCocq. (A104-111) The court, relying on *Daubert*, as well as this Court's decision in *Peitzmeier v. Hennessy*, 97 F.3d 293 (8th Cir. 1996), found that Mr. LeCocq was not qualified as an expert by "knowledge, skill experience, training or education" (A106), and because the court did not "believe his opinion [was]

sufficiently reliable so that it [would] assist the trier of fact to understand the evidence or to determine a fact in issue." (*Id*.)

Given the court's exclusion of Andrew LeCocq, Raymond moved for summary judgment because Appellant no longer could meet her burden to establish a prima facie case in either negligence or strict liability under Arkansas law. (A115) Appellant responded and, incredibly, counter-moved for summary judgment alleging that she had presented questions of fact through the allegations in her pleadings and her own deposition testimony. (A131)

Appellant also moved for reconsideration of the court's exclusion of Mr. LeCocq because it did not conduct a Rule 104(a) hearing before excluding Mr. LeCocq from testifying. (A112) In the alternative, Appellant asked the district court for a continuance of the September 9, 2002 trial date so that she could obtain a new expert. (*Id*.) On July 10, 2002, the court denied Appellant's request for reconsideration, recognizing that Mr. LeCocq's deposition was exhaustive of all facts that a Rule 104(a) hearing could have developed. (A144-146) The court also denied Appellant's motion for a continuance as premature, given that there were almost two months until the scheduled trial date. (*Id*.) However, the court did give Appellant another opportunity to retain a new expert despite the fact that discovery had closed and all experts were to have already been named and deposed. (*Id*.)

In its order, the court directed the parties to cooperate in expediting the deposition of any newly proposed expert. (*Id*.) Further, the court ordered that if Raymond was to challenge any new expert, it must file its motion no later than August 16, 2002. (*Id*.)

On more than one occasion during the thirty day period, Raymond's counsel contacted Appellant asking if a new expert had been retained. (*See* A176) Indeed, as Appellant conceded when asked by the court, having yet to hear from Appellant about her own new putative expert, Raymond contacted Appellant on August 9, 2002 and Appellant informed Raymond that she had contacted John P. Sevart but that no retainer agreement had been signed. (A197) More importantly, Appellant informed Raymond's counsel that a deposition would not take place by August 16, 2002 because no formal retention agreement had been signed, and the expert had not issued any opinions. (A187)

On August 16, 2002, Raymond complied with the court's order and moved for the exclusion of any newly named expert because Appellant had failed to abide by the court's deadline. (A176) The same day, Appellant renewed her motion for a continuance, asking the court to extend the trial date for a third time so that her new expert could fully investigate the case, even though the new expert had not even been retained yet. (A165)

On August 23, 2002 the court ordered that Appellant submit a statement by August 28, 2002, to confirm her compliance with the Court's prior order requiring proper designation in advance of August 16, 2002. This confirmation was to include the exact date, manner and content of her new expert disclosure (A186) On August 27, 2002, Appellant filed the requested statement reiterating that as of August 9, 2002, the date her counsel informed Raymond of Mr. Sevart's identity, she had not officially retained him. (A187) Also on August 27, 2002, Appellant filed her new Rule 26 expert disclosure. (A191) Included in the filing was a letter dated August 26, 2002 from Mr. Sevart which served as his *preliminary* report and expert opinions. (A197)

On August 28, 2002, Raymond promptly renewed its motion to strike filed on August 16, 2002. (A193) Raymond argued that Appellant had ignored the court's order and neglected to name her new expert within the allotted time frame granted by the court. (*Id*.) Raymond reiterated that Appellant should not have had a second chance at curing her initial error by retaining a new expert, but even Raymond's objections aside, Appellant failed to comply with the court's generous order. (*Id*.)

On August 30, 2002, the court struck Appellant's newly proposed expert because Appellant failed to timely disclose him in accordance with the court's July

15, 2002 order and also denied Appellant's renewed motion for continuance. (A196) The court stated that it would no longer delay its schedule because of Appellant's poor choice of an initial expert and later delay in disclosing a second expert. (A198)

After striking both of Appellant's experts, the court granted Raymond's motion for summary judgment in accordance with this Court's decision in *Dancy v. Hyster*, 127 F.3d 649 (8th Cir. 1997)(applying Arkansas law). (A220) However, Appellant had again responded to Raymond's motion for summary judgment on September 3, 2002 (as permitted by the court's July 15, 2002 order) as well as responded to Raymond's renewed motion to strike. She also moved once again for reconsideration of the district court's previous order. (A200-219; A225-226)

In light of these filings, the court reconsidered its previous decisions granting Raymond's renewed motion to strike and motion for summary judgment. (A233-236) In an appropriate exercise of discretion, the district court held that Appellant offered no new arguments to support any objection to Raymond's renewed motion to strike or to support its latest request for a continuance, and therefore its previous decisions would stand. (*Id*.) The court also declared that its grant of summary judgment was proper. (*Id*.)

Appellant thereafter filed her notice of appeal.

STATEMENT OF THE FACTS

This is a product liability action. Appellant's claims arose out of an accident involving a Raymond Model 20 narrow aisle forklift truck. According to Appellant, she was operating the Model 20 on August 1, 1996 during her employment, when the forklift allegedly ejected the plaintiff causing her to suffer an injury. (A10)

Appellant brought causes of action under theories of negligence and strict liability in connection with the Model 20. (A10-12) Appellant also contended that Raymond failed to warn adequately of the dangers associated with the use of the Model 20. (A12) Appellant alleged that Raymond defectively designed the Model 20 because it did not incorporate certain other safety features, including alternative designs and warnings. (A10-13) According to Appellant, as a result of the alleged defects in the design of the Model 20, she suffered injury. (*Id*.)

In support of her design defect case, Appellant initially offered Andrew LeCocq, a human factors engineer and self-professed expert. After Raymond successfully moved for Mr. LeCocq's exclusion based on his lack of qualifications and the unreliability of his opinions, Appellant was given another opportunity to cure her fatal shortcomings. Unfortunately, Appellant failed to adhere to the district court's order, which required her to disclose her new expert and produce him/her for deposition prior to August 16, 2002. The district court held that

Appellant's disregard for the court's established time frame resulted in her new expert's exclusion.

Recognizing Appellant had no expert evidence in support of her causes of action, Raymond moved for summary judgment and the court granted it. The court found that in this case, given the complexity of the issue – the design of a complex piece of equipment – Appellant must have expert testimony to proceed to trial. (*See* A223) Because she had none to support her design defect allegations, Appellant's case could not go forward and the court dismissed her case with prejudice. (*Id.*)

SUMMARY OF THE ARGUMENT

I. Summary Judgment was appropriately granted after Appellant's two experts were excluded, leaving her without sufficient evidence to establish a prima facie product liability case under Arkansas law. Without any admissible expert evidence, Appellant was unable to establish that the Model 20 was defective and that any alternative designs existed.

II. The district court did not abuse its discretion when it excluded Andrew LeCocq and John Sevart, Appellant's proposed experts. Mr. LeCocq was not qualified to offer relevant testimony, nor were his opinions reliable. Further, the district court did not abuse its discretion when it did not hold a Rule 104(a) hearing before excluding LeCocq. Mr. Sevart was properly excluded because

Appellant failed to timely disclose him in accordance with the district court's order.

III. The district court did not abuse its discretion when it did not grant Appellant's motions for continuance and motions for reconsideration. Appellant had ample opportunity to present admissible expert evidence and failed to do so. First, she offered an unqualified expert in Andrew LeCocq, and then when granted an opportunity to cure her deficiencies, she failed to diligently retain Mr. Sevart and did not disclose him by the deadline imposed by the district court. It is not an abuse of discretion for the district court to deny Appellant's motions given the circumstances surrounding the denials.

ARGUMENT AND STANDARD OF REVIEW

I. SUMMARY JUDGMENT WAS APPROPRIATE BECAUSE APPELLANT'S EXPERTS HAD BEEN STRUCK AND APPELLANT COULD NOT ESTABLISH HER CAUSES OF ACTION UNDER ARKANSAS LAW.

A. Legal Standard

The standard this Court is to apply when reviewing a district court's grant of summary judgment is de novo review. *See Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293, 298 (8th Cir. 1996); *Dancy v. Hyster*, 127 F.3d 649, 652 (8th Cir. 1997). Applying the same standard as applied by the district court, this Court must determine if there is any genuine issue of material fact in dispute and whether the

moving party is entitled to judgment as a matter of law. *See Dancy*, 127 F.3d at 652; *see also* Fed. R. Civ. P. 56(c).

The Court must view the evidence in the light most favorable to the Appellant, giving her the benefit of all inferences that may be reasonably drawn from the evidence. *Id*. However, Appellant "*may not rest upon the mere allegations or denials of the . . . pleading[s], but . . . by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial*." *Id*. at 653 (*quoting* Fed. R.Civ. P. 56 (e))(emphasis added). The mere existence of some alleged factual dispute between the parties is not sufficient by itself to deny summary judgment. *See Get Away Club, Inc. v. Vic Coleman*, 966 F.2d 664, 666 (8th Cir. 1992). "Instead, the dispute must be outcome determinative under prevailing law." *Id*.

B. The District Court Appropriately Granted Summary Judgment Because Appellant Could not Satisfy Her Burden Under Arkansas Law Without Expert Evidence.

As a threshold matter, this Court must determine whether the district court abused its discretion when it struck Appellant's experts before it can appropriately address this issue on appeal. *See infra* section II below. If the district court did not abuse its discretion, and the Appellant was appropriately left with no expert evidence, her causes of action fail as she cannot meet her burden under Arkansas law. *See Dancy*, 127 F.3d 649. Contrary to Appellant's argument, she failed to

present any competent and admissible expert evidence and the district court appropriately granted summary judgment.

Appellant's initial expert witness, Andrew LeCocq was excluded because he was not qualified to give expert testimony, nor were his opinions reliable to meet the standard for admissibility espoused under *Daubert v. Merrell Dow Pharmaceuticals, Inc*. (*See infra* section II, (B)(1); *see also* A104-111) Moreover, Appellant failed to timely disclose her second expert, John Sevart, despite being given a second chance to name an expert in support of her case, resulting in his exclusion as well. (*See infra* section II, (C); *see also* A196-199)

Therefore, the district court appropriately held that Appellant was unable to satisfy her burden that the Model 20 was defective and caused her harm. (*See* A220-223) Without any evidence of defect or causation, Appellant could not sustain a cause of action couched in negligence or strict liability principles. (*See id*.).

While Arkansas law does not require expert testimony in all product liability cases, *see Dancy v. Hyster*, 127 F.3d at 653, "*[t]he mere fact of an accident, standing alone, does not make out a case that the product is defective*." *Id*. (*quoting Higgins v. General Motors Corp.*, 287 Ark. 390, 699 S.W.2d 741, 743 (1985))(emphasis added). A plaintiff must provide specific proof of a defect, unless "common experience teaches the accident would not have occurred in the

absence of a defect." *Id*.(internal citations omitted). Or, the plaintiff has negated other possible causes for the accident. *See Id*. (*citing Williams v. Smart Chevrolet Co.*, 292 Ark. 376, 730 S.W.2d 479, 482(1987)).

The district court appropriately relied on *Dancy* as it is "squarely on point." (*See* A221-223). In *Dancy*, the 8th Circuit affirmed this District Court's order granting summary judgment in favor of Defendant Hyster Company because the lower court had excluded the testimony of the plaintiff's proffered expert. Without such testimony, plaintiff could not meet the burden necessary to sustain causes of action in strict liability or negligence. *See Dancy*, 127 F.3d at 651. The plaintiff in *Dancy* contended that the lift truck was not designed properly because it lacked a safety device.[1] *Id*. Due to the defect allegations, and the fact that the plaintiff alleged that the lift truck should have incorporated an alternative design, the court held that jurors would not possess any "common understanding" about how the lift truck was designed. *Id*. Nor did the plaintiff negate other possible causes of the accident. *Id*. at 654. Thus, because the plaintiff's expert had been struck and the

[1] This Court in *Dancy* recognized that the lift truck at issue in that case was "a machine similar in appearance to a forklift." 127 F.3d at 650.

plaintiff himself could not posit any circumstantial evidence to satisfy his burden, the court entered summary judgment in favor of the defendant. *Id.*[2]

Appellant's case suffers from the same fatal flaws. The district court properly struck Appellant's expert, Andrew LeCocq, on June 14, 2002. (*See* A104-111). Without Mr. LeCocq, plaintiff was left with no evidence that the Model 20 was defective nor that it in any way caused her injury.

Then, despite the fact that Appellant already failed to present admissible expert evidence on her first attempt, the district court gave her another chance. (*See* A144-146) The court gave plaintiff thirty days to associate a new expert and offer him/her for deposition. (*Id*.) Under the court's order, Raymond had until August 16, 2002 to move to strike any new witness. *See id*.

Despite Appellant's insistence to the contrary, Appellant failed to disclose her new expert and Raymond moved to strike any new expert given plaintiff's failure to comply with the court's order. (*See* A176). Given plaintiff's failure to comply with the court's order, the district court struck her new expert. (*See* A1996-199).

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[2] The court's decision in *Dancy* applied equally to the plaintiff's strict liability claim as well as his negligence claim. *See Dancy*, 127 F.3d at 654. The court held: "[m]uch of what we said with respect to Dancy's product liability claim applies to his negligence claim: absent expert testimony, there is no basis for the jury to evaluate the actions of an ordinarily prudent person in the same situation as Hyster." Id.

In light of the absence of any expert testimony in support of Appellant's case, the district court, quoting *Dancy v. Hyster* at length, granted Raymond's motion for summary judgment. (*See* A220-223). The district court held that "[Appellant] in this case has alleged the product in question should have been different, not merely that it did not function properly." (*See id*. at 223). Applying *Dancy* and Arkansas law, the jury must have the benefit of expert testimony to find for the Appellant in this type of a case. *See Dancy*, at 653.

Conveniently, Appellant ignores *Dancy* and its applicability to this case. Rather she argues that she had presented a prima facie case even without expert testimony and that she is entitled to summary judgment. She contends that because she testified that the Model 20 was defective, i.e., it did not incorporate an operator restraint system, that she has somehow satisfied the elements of her causes of action under Arkansas law. *See* Appellant's Br. at 12 (citing to A356, page 67 of Appellant's deposition). Incredibly, Appellant ignores the fact that the testimony she gave, that she now contends establishes her prima facie case against Raymond, was given subject to her counsel's objection that the question she was responding to called for expert testimony. (*See* A356). Indeed, Appellant herself started her response by qualifying it with the phrase, "I'm no expert."

Regardless, Appellant is required to produce more than her own *ipse dixit* that the Model 20 was defective. *See Dancy*, 127 F.3d at 653. "[T]he mere fact of

an accident, standing alone, does not make out a case that the product is defective." *Id*. As this Court noted in *Dancy*, lay jurors are not likely to possess "common understanding" about how products are designed; especially a narrow aisle forklift. *See id*. Even though Appellant may not have the burden of proving that her proposed safer alternative design was available and feasible in terms of cost, practicality and technological possibility, she "*still has the burden of proving the existence of a defect by showing that a safer alternative design exists*." *Id*. (emphasis added).

Without any expert to offer such evidence, Appellant cannot meet her burden. Accordingly, Appellant's case fails as a matter of law and summary judgment was appropriate and the district court's order should be affirmed.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT STRUCK ANDREW LECOCQ AND JOHN SEVART.

In her opening brief, Appellant argues that the district court abused its discretion by excluding her experts. Nothing could be further from the truth. The district court took great care in exercising its discretion when it excluded each of Appellant's experts in turn, albeit for different reasons.

A. Legal Standard

The appropriate standard of review regarding decisions concerning the admissibility of expert testimony is abuse of discretion. *See Dancy*, 127 F.3d at

651; *Peitzmeier*, 97 F.3d at 296. District Court decisions will not be disturbed on appeal absent an abuse of the court's discretion. *See id*.

B. The District Court Properly Excluded Andrew LeCocq Because He Was Not Qualified To Testify Under Rule 702 Or *Daubert*.

Mr. LeCocq was not qualified to offer expert testimony under Rule 702 of the Federal Rules of Evidence, nor were his opinions reliable under *Daubert v. Merrill Dow*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and its line of cases. Further, it is not an abuse of discretion for a court to decide not to conduct a Rule 104(a) hearing, especially when, as here, the record is complete and the court can make a full determination based solely on the record. *See Kumho Tire Company, Ltd. V. Carmichael, et al.*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed. 2d 238 (1999); *Oddi v. Ford Motor Company*, 234 F.3d 136 (3rd Cir. 2000).

1. Mr. LeCocq was not qualified to testify as an expert, nor were his opinions reliable.

This Court need only review Judge Reasoner's well reasoned decision striking Andrew LeCocq to appreciate fully that the district court acted well within its discretion when it struck Mr. LeCocq. (*See* A104-111). The district court not only confirmed that Mr. LeCocq was not qualified to offer testimony, but he also conducted the second prong of the test for admissibility of an expert and found Mr. LeCocq's opinions were not reliable.

(a) LeCocq was not qualified as an expert.

Mr. LeCocq himself admitted he was not an expert in the design of forklifts like the Model 20.[3] (A387). While Mr. LeCocq's deposition transcript is included in the joint appendix in its entirety (A367-666), the district court, citing Raymond's argument, highlighted the fatal admissions of Mr. LeCocq. (*See* A105-106). Based on these admissions, the district court agreed that Mr. Lecocq was not an expert in the field of forklift design and engineering. (*See id*.).

Rule 702 of the Federal Rules of Evidence govern the admissibility of expert testimony. *See* FRE 702 (2002). The rule provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Id. Put another way, expert testimony based on "scientific, technical or other specialized knowledge" is admissible if: "(1) *the expert is qualified to testify competently regarding the matters he intends to address*; (2) *his*

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[3] Mr. LeCocq unequivocally admitted:

Q: Would you agree with me, Mr. Le Cocq, that you're not an expert in the design of forklifts like the Model 20?

A. In the expert in the design?

Q. Yes.

A. ***No, I am not. No.***

(A387)(emphasis added).

methodology is sufficiently reliable; and (3) *the testimony will assist the trier of fact by bringing the expert's knowledge to bear upon a fact in issue*." KW Plastics, et al. v. United States Can Co., 131 F.Supp. 2d 1289, 1291 (M.D. Ala. 2001)(*citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 2794-2797, 125 L. Ed. 2d 469 (1993)) (emphasis added).

Daubert v. Merrell Dow Pharmaceuticals, Inc. addressed and clarified the language of Rule 702. The "gatekeeping" principles established in *Daubert* were subsequently expanded and explained in *Kumho Tire Company, Ltd. v. Carmichael, et al.* The 8th Circuit in the cases of *Peitzmeier v. Hennessy Industries, Inc.*, 97 F.3d 293 (8th Cir. 1996) and *Dancy v. Hyster*, 127 F.3d 649 (8th Cir. 1997) adopted the principles espoused in *Daubert*. More recently, the 8th Circuit applied the Supreme Court's *Kumho Tire* holding in *Jaurequi v. Carter Manufacturing Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999).

The Supreme Court emphasized in *Daubert*, and later reaffirmed in *Kumho Tire*, that the trial judge is to exercise "gatekeeping" responsibility with regard to the admission of expert testimony and opinions. "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 113 S. Ct. at 2795; *accord Kumho Tire*, 119 S.Ct. at 1174.

According to the Supreme Court in *Daubert*, Rule 702 requires that expert "evidence or testimony 'assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 113 S.Ct. at 2795. The Court further stated with regard to the relevance inquiry, "[e]xpert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id*. Instead, a valid scientific connection to the pertinent inquiry is a precondition to admissibility. *Id*. at 2796.

The district court in this case, acting as gatekeeper, acknowledged Mr. LeCocq's admission that he had "never designed a stand-up forklift, consulted on the design of a stand-up forklift, designed a component part of a stand-up forklift, or designed a warning for a stand-up forklift." (*See* A105-106). Moreover, the court held that despite the fact that some engineering and design principles can be applied universally, Mr. Lecocq did not have the requisite familiarity with the machine in question. (*Id*.) Rather, Lecocq admitted that he had neither operated, nor even seen a stand-up forklift. (*Id*.) Accordingly, the court found that he was not qualified under Rule 702. (*Id*.)

Appellant conveniently ignores LeCocq's admissions, and rather argues that Mr. LeCocq should be permitted to testify because he possesses a wealth of experience in human factors engineering over the course of 37 years. *See* Appellant's Br. at 15. Looking at Mr. LeCocq's curriculum vitae (A78), it at best

reveals experience in specific fields related to human factors. However, nothing about his experiences or training rise to the level of design expertise in the relevant field – forklift design. After all, he himself admitted that. (*See* Supra fn3; A387)

Appellant contends that this Court should ignore such an admission because Mr. LeCocq has experience working with Air Traffic Control Systems, F-16 aircrafts, blood/cardioplegia systems and aerospace equipment, as well as holding 4 patents (A80) – none of which have anything to do with operator restraints, safety devices or warnings for industrial equipment. Such a contention ignores the purpose of *Daubert* completely.

Mr. LeCocq is exactly the type of expert *Daubert* and Rule 702 are meant to exclude. He possesses no expertise that is relevant to the issue at hand – the design of a forklift. Nor could any of his opinions assist the trier of fact. That is why the district court excluded him. Doing so was a proper exercise of its gatekeeping responsibility, not an abuse of discretion.

(b) LeCocq's opinions are unreliable.

Having found that Mr. Lecocq was unqualified to testify as an expert, the court could have stopped there and excluded Mr. Lecocq. However, the court, went on to analyze Mr. LeCocq's substantive opinions for reliability. (*See id.* at 106-110). The court found that there existed "*an even greater reason to forbid [Lecocq] from testifying in this case. . . .*" (*See id*. at 106)(emphasis added). The

court held that LeCocq's opinion was not sufficiently reliable so that it would assist a trier of fact to understand the evidence or determine a fact at issue.

Indeed, under *Daubert* and its progeny of cases, there is no question that LeCocq's opinions are unreliable and the district court appropriately excluded his testimony.

Daubert as well as 8th Circuit precedent make it plain that the district court must make an assessment whether the reasoning and methodology underlying the testimony is scientifically valid. *See Peitzmeier*, 97 F.3d at 296 (*citing Daubert*, 509 U.S. at 591-593, 113 S.Ct. at 2796). "[P]roposed testimony must be supported by appropriate validation--i.e. 'good grounds,' based on what is known." *Daubert*, 113 S.Ct. at 2795.

The Court in *Daubert* provided a list of four factors which should be used in determining the soundness of the methodology from which the proffered opinions are derived:

> (i) whether the theory or technique can be and has been tested; (ii) whether the theory or technique has been subjected to peer review and publication; (iii) the known or potential rate of error or the existence of standards; and (iv) whether the theory or technique used has been generally accepted.

Daubert at 2796-97.

While the above factors are not exclusive, nor do they constitute a "definitive checklist or test," *see Kumho Tire*, 119 S.Ct. at 1175, the trial judge can

exercise "considerable leeway" in deciding in a particular case how to go about determining whether particular expert testimony is reliable. *Id*. at 1176.

The Court in *Kumho Tire* instructed that, "[t]he objective is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Id*.

These very principles are well settled in this circuit. *See Peitzmeier*, 97 F.3d 293; *Dancy*, 127 F.3d 649; *Jaurequi v. Carter Manufacturing Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999). Indeed, the district court appropriately noted that the case at bar is strikingly similar to *Peitzmeier*. (*See* A109-110).

In *Peitzmeier*, the plaintiff was injured after a tire and rim exploded off of a tire changing machine that had been manufactured by the defendant, Hennessy Industries. The plaintiff attempted to prove his products liability allegations through a mechanical engineer named Alan Milner.

After conducting its *Daubert* analysis, the district court excluded Milner's testimony, and granted the defendant's motion for summary judgment because the plaintiffs no longer had the technical evidence necessary to support their strict liability theory. *Id*. at 296. This Court considered each of the four factors set out in *Daubert* as they applied to the expert's proposed testimony. The Court held that

Milner's testimony and opinions were unreliable because he had failed to satisfy any of the factors espoused under *Daubert*. *Id*. Therefore, it was not an abuse of discretion to exclude him. *Id*.

Like Milner in *Peitzmeier*, Lecocq failed to satisfy the rigorous standards of *Daubert*. (*See* A106-111). As the district court recognized, Lecocq had never designed or tested for safety or utility any of the proposed safety devices that he claimed were missing from the Model 20 forklift truck. (*See* A109-110; *see also* A449-450). Moreover, Lecocq had not even produced a sketch of an alternative design or developed a prototype. (*Id*.). He had not conducted any testing, nor subjected his alternative designs to peer review. (*Id*.). Incredibly, Lecocq admitted that he had not completed any of the well established design principles used by design engineers that he thoroughly described at his deposition. (*Id*. at A444-448).

Mr. LeCocq did nothing to satisfy the requirements for admissibility under *Daubert* and *Peitzmeier*. Just like Milner in *Peitzmeier*, Mr. LeCocq's opinions are not reliable and equate to nothing more than speculation and conjecture. As this Court did in *Peitzmeier*, it should affirm the district court's exclusion of Mr. LeCocq, as the decision to exclude LeCocq was within the discretion of the district court, and there is absolutely nothing in this record to suggest that excluding Andrew LeCocq was an abuse of discretion.

2. Further it was not an abuse of discretion that no Rule 104(a) hearing was conducted before excluding LeCocq.

Given the record before the court, it was able to determine, without the need of a hearing, that Mr. LeCocq was not qualified to offer expert testimony and that nothing more informative would have come out of an unnecessary hearing. (*See* A145) Thus, there was no abuse of discretion.

It is well within the district court's right to determine that an expert is not qualified to give testimony in a case without holding a Rule 104(a) hearing. *See Kumho Tire*, 526 U.S. at 152, 119 S.Ct. at 1176; *see also Oddi v. Ford Motor Co.*, 234 F.3d at 151-155 (*in limine* hearing not required to make *Daubert* determination). The trial court has latitude in deciding how to test an expert's reliability, and to decide whether or when other proceedings are needed. *See Kumho Tire*, 526 U.S. at 152, 119 S.Ct at 1176.

Appellant cites to *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3rd Cir. 1999) in support of her contention that the district court is required to hold such a hearing. *See* Appellant Br. at 18. However, in *Padillas*, the district court was faced with a "scant" record and the 3rd Circuit held that based on the record there was not enough to support the lower court's decision to strike the expert without a Rule 104(a) hearing. *See Padillas*, 186 F.3d at 418. However, the same court stressed that a *Daubert* hearing is not always required. *See id.*

In *In re TMI Litigation*, 199 F.3d 158 (3rd Cir. 2000), the 3rd Circuit unequivocally stated that "[w]e did not intend [in *Padillas*] to suggest that an in limine hearing is always required for *Daubert* gatekeeping." 199 F.3d at 159. Moreover, in *Oddi v. Ford Motor Co.*, the 3rd Circuit held that a district court does not abuse its discretion when it decides to exclude a proposed expert without holding a hearing when it bases its decision on the depositions and affidavits in the record. *See* 234 F.3d 136.

The same holds true in this case. At his deposition, Mr. LeCocq provided all necessary information for the court to make its findings. To hold a hearing to rehash his admissions would have been a waste of the court's time and resources. For those reasons, the district court did not abuse its discretion in deciding not to hold a Rule 104(a) hearing.

C. Appellant's Second Expert Was Properly Excluded Because Appellant Failed To Disclose Him As Her New Expert In A Timely Manner And In Accordance With The Court's Order.

The district Court did not abuse its discretion when it excluded Appellant's second expert, John Sevart.[4] He was excluded because Appellant failed to disclose him in accordance with the court's July 15, 2002 Order. (*See* A196-199).

A district court has the discretion to strike an expert not timely disclosed as an appropriate sanction. *See Bizzle v. McKesson Corporation*, 961 F.2d 719 (8th Cir. 1992); *accord Pride v. Bic Corporation*, 218 F.3d 566, 578-579 (6th Cir. 2000).

After her first expert was properly excluded from testifying, Appellant moved for a continuance so that she could associate a new expert. (*See* A112). Despite Raymond's objections, the district court, while denying her motion for continuance, allowed Appellant the opportunity to find a new expert, and effectively gave her until August 16, 2002 to do so – the date Raymond was required to move to strike any new expert. (*See* A127-129).

[4] Mr. Sevart was not excluded based on his lack of qualifications or because his opinions were not reliable, although Raymond likely would have disputed that issue. Indeed, Raymond, in all likelihood, would have moved for Mr. Sevart's disqualification. This is especially true given Mr. Sevart's recent exclusion in *Dhillon v. Crown Controls Corp*, 269 F.3d 865 (7th Cir. 2001), a case where Mr. Sevart proposed very similar opinions in a very similar forklift design case.

In its July 15, 2002 order, the court charged each party to cooperate with the scheduling of any new expert's deposition, so that if Raymond chose to challenge the expert, it could by August 16th. (*See id*.). In accordance with the court's order, Raymond contacted Appellant's counsel and asked if a new expert had been retained. (*See* A187). Counsel for Appellant declared that Mr. Sevart had been contacted and was going to be the new expert but that he had not been retained, nor had he prepared opinions. (*See id*.).

On August 16, 2002, Raymond moved to strike any new expert Appellant may offer because Appellant had failed to properly disclose the expert, failed to produce a written report detailing his opinions and failed to cooperate with Raymond to produce him for deposition. (*See* A176).

As of August 16, 2001, Raymond's last day to move to strike Appellant's new expert, Appellant had not retained Mr. Sevart. (*See* A165 ("Plaintiff has located and ***will*** retain as expert witness J.B. Sevart P.E. …")). Incredibly, Appellant did not disclose Mr. Sevart until August 27, 2002 – eleven days after Raymond's deadline to move to strike any newly designated expert. (*See* A191).

Once Appellant filed her new disclosure, Raymond renewed its motion to strike because Appellant had failed to comply with the court's previous order. (*See* A193). Finding that Appellant had failed to comply with the terms of the court's

extension to find a new expert, the lower court granted Raymond's motion to strike Sevart. (*See* A196-199).

Appellant's brief ignores her fatal omission and instead argues that Mr. Sevart was qualified to give expert opinion in this case. *See* Appellant Br. at 17. However, this completely avoids the true reason her second expert was excluded. While Raymond does not concede Mr. Sevart's qualification or reliability (*see supra* fn 4), he was properly excluded because Appellant chose to not comply with the court's order.

Later in her brief, Appellant also argues that she disclosed Sevart to Raymond, that Raymond did not notice his deposition, that she had not been ordered to produce him for deposition, and denied telling Raymond that a deposition could not be held. *See* Appellant Br. at 25-26. First, the district court's July 15, 2002 Order specifically orders any new expert be deposed and that the parties cooperate in scheduling it. (*See* A128). Second, Raymond had no duty to notice a deposition of an expert who had not been disclosed, let alone not retained. Any notice would have been ineffective because as of August 16, 2002, Appellant had not retained Mr. Sevart, nor had he authored any opinions in this case. (*See* A165).

Accordingly, the court, having offered Appellant the opportunity to proceed with another expert, finally closed the door when she failed to take advantage of

the district court's generosity. Therefore, the court's decisions striking Mr. Sevart should be affirmed. The district court's discretion was properly exercised.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANT'S MOTIONS FOR CONTINUANCE AND MOTIONS FOR RECONSIDERATION.

Rather than attempt to decipher Appellant's arguments in section III, IV and V of her brief, individually, Raymond will respond to each within this section of its brief. Raymond understands Appellant to be challenging the district court's denial of her several motions for continuance and denial of her motions to reconsider the exclusion of her experts.

Raymond has fully addressed many of the issues relevant to Appellant's arguments in previous sections of this brief. *See supra* sections I and II, (B) and (C). To the extent Appellant is again arguing that the district court abused its discretion by not holding a Rule 104(a) hearing, specifically *see supra* section II, (B)(2) of this brief.

A. Legal Standard

The court's denial of Appellant's motions for continuance and reconsideration are reviewed for an abuse of discretion as Appellant points out in her brief.

However, the United States Supreme Court has defined "abuse of discretion" in the context of a denial of a motion for continuance as "an unreasoning and

arbitrary insistence upon expeditiousness in the face of a justifiable request for a delay." *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 1616-1617, 75 L.Ed. 2d 610 (1983). The test for whether a trial court has abused its discretion in denying a continuance is not mechanical; rather, it depends mainly on the reasons presented to the district judge at the time the request was denied. *See Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 849, 11 L.Ed. 2d 921 (1964). A broad and deferential standard is to be afforded the district court in denying continuances. *See Slappy*, 461 U.S. at 11, 103 S.Ct. at 1616. Indeed, the burdensome task of assembling a trial counsels against such continuances. *Id*.

When reviewing a motion to reconsider, as Appellant has posited it, *see* Appellant's Br. at 20, this Court does not review the underlying judgment or order, but rather, the Court only looks at the district court's order denying the motion. *See Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999).

B. The District Court Did Not Abuse Its Discretion Denying Appellant's Requests For Continuance.

Appellant was given a second chance to support her case with expert testimony, but failed to do so and now seeks to blame the district court for her lack of diligence. Despite Raymond's objections and persuasive authority to the contrary (*See* A147-153), the district court, after striking Appellant's first expert, gave her another chance to cure her deficiencies in her proofs before dismissing her case. (A128). Appellant's argument is wholly without merit.

Appellant's contention that she deserved a continuance to reopen expert discovery or that the court should have reconsidered its decision striking her experts is ridiculous given that Appellant was already given two chances. Her seemingly endless renewals of her motions for continuance and reconsideration are nothing more than transparent attempts to reopen expert discovery, once the weaknesses in her initial expert testimony had been pointed out.

Appellant's attempt to distinguish *Hollingsworth v. United States*, 928 F.Supp. 1023 (D. Idaho 1996), a case she previously relied upon in support of her request for continuance to find a new expert (*see* A161) and her response to Raymond's motion for summary judgment (*see* A135), is disingenuous and not compelling either. Appellant contends *Hollingsworth* is different from the case at hand because in *Hollingsworth* there were approximately four months from the time the expert was excluded and trial. Had Appellant not had over three years from the commencement of her action to conduct discovery and retain a qualified expert, such an argument might be compelling.

Analyzing the facts pertinent to this issue, nothing suggests that the court abused its discretion denying Appellant a continuance. The district court, rather than granting Raymond's motion for summary judgment because Appellant had no expert evidence, gave her one last chance to save her case. Appellant chose not to. Appellant now criticizes the district court for not giving her enough time. This is

an almost arrogant position to take, given that the district court could have granted Raymond's motion for summary judgment without ever offering Appellant another bite at the apple.[5] There is absolutely no abuse of the court's discretion. Rather Appellant abused the district court's generosity.

C. The District Court Did Not Abuse Its Discretion When It Denied Appellant's Motions For Reconsideration.

Just like the district court did not abuse its discretion denying Appellant's motions for continuance, nor did it abuse its discretion denying Appellant's motions for reconsideration. The record clearly reflects that Appellant's first expert was not qualified to give expert testimony. *See supra* section II, (B). Furthermore, Appellant's disregard for the court's deadline to name her new expert is clear grounds for disqualification of Mr. Sevart. *See supra* section II, (C).

For those reasons, the district court's denials of Appellant's motions for reconsideration should stand.

CONCLUSION

For the above stated reasons, The Raymond Corporation respectfully requests that this Court affirm the district court's exclusion of Appellant's expert witnesses, its denials of Appellant's motions for continuance and reconsideration,

[5] *See e.g. Nelson v. Tenn. Gas Pipeline Company*, 243 F.3d 244, 249-250 (6th Cir. 2001); *see generally Weisgram v. Marley Company, et al.*, 528 U.S. 440, 455, 120 S.Ct. 1011, 1021 (2000).

and also affirm its grant of Summary Judgment in favor of The Raymond Corporation and dismissal with prejudice.

Respectfully submitted this 6th day of December, 2002.

FRANCIS H. LOCOCO
JOSHUA B. FLEMING

Quarles & Brady LLP
411 East Wisconsin Avenue
Milwaukee, WI 53202-4497
(414) 277-5000
(414) 271-3552 (facsimile)

JAMES M. SIMPSON, JR.
Friday, Eldrege & Clark
400 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 376-2011

Attorneys for Defendant-Appellee,
The Raymond Corporation

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Defendant-Appellee The Raymond Corporation, hereby certifies that the foregoing brief complies with the type and volume limitation of Fed. R. App. P. Rule 32(a)(7)(B) in that the brief is set forth in Times New Roman style and contains 7125 words, excepting the Summary of the Case, Corporate Disclosure Statement, Table of Contents, Table of Authorities, and certifications of counsel, as measured by the word-processing system (Microsoft Word 2000) used to prepare the brief.

Dated this 6th day of December, 2002.

Joshua B. Fleming
Attorney for Defendant-Appellee

PROOF OF SERVICE AND FILING

The undersigned counsel for the Defendant-Appellee The Raymond Corporation, hereby certifies that he caused both paper and digital copies (which to the best of the undersigned's knowledge is virus-free) of the foregoing Brief of Defendant-Appellee to be served upon:

Bill E. Bracey, Jr., Esq.
420 Park Street
Blytheville, Arkansas 72315

Michael E. Gans
Clerk of Courts
U.S. Court of Appeals, 8th Cir.
111 South 10th Street
St. Louis MO 63102

by depositing the same, in an envelope properly addressed in the United States First-Class mail, postage prepaid, this 6th day of December, 2002.

Joshua B. Fleming
Attorney for Defendant-Appellee